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Chairperson MacDonald, Members of the Commission on Sentencing, and Legislative Staff:

By way of introduction, my name is Mary Ann Wellbank, and I live in Clancy, Montana. I am a private citizen, and work for the private sector in an area unrelated to criminal justice.

I am grateful for the bi-partisan effort that resulted in enactment of Senate Bill 224, and appreciate your willingness to serve on the Commission. I believe this Commission is extremely important to Montana.

I'd like to thank you in advance for the opportunity to express my views. I am keenly interested in the topics of criminal sentencing and criminal justice reform. Although I work full-time, I plan to take time off to attend every meeting of the Commission that I am able to attend, and periodically contribute my thoughts, insights, and testimony. I would also love to have individual conversations with you, and want you to feel free to call or email me if you have any questions.

INTRODUCTION

Over the years, significant attention has been focused on the "back end" of the criminal justice system – alternative sentencing, probation and parole practices, reducing recidivism, etc. However, I encourage the Commission to focus on the "front-end" as well: how individuals become classified as "felons", and the length of their respective incarcerations.

My points can best be made through a combination of statistical, factual, and anecdotal information. I have a story to tell that is relevant to the Commission's charge in three areas: 1) identify strategies to safely reduce incarceration; 2) consider issues regarding disparity in the criminal justice process; and 3) identify opportunities to streamline and simplify the criminal code, and balancing sentencing practices and policies with budget constraints. I will also propose data for collection to make data-driven decisions and develop evidence-based practices.

Please bear with me as I provide some technical background information in the next couple of pages before I begin the story.

45-5-207, MCA. CRIMINAL ENDANGERMENT

A top offense for adult convictions

The history of 45-5-207 MCA begins in 1987 with the enactment of House Bill 301¹, which changed the definition of negligent vehicular assault (a misdemeanor), added a new section creating a felony offense of criminal endangerment, and added another new section creating the misdemeanor of negligent endangerment.

45-5-207, MCA, Criminal Endangerment, as enacted in HB301, provides “A person who *knowingly* engages in conduct that creates a substantial risk of death or serious bodily to another commits the offense of criminal endangerment. A person convicted of criminal endangerment shall be fined in an amount not to exceed \$50,000 or imprisoned in the *state* prison for a term not to exceed *ten years*, or both.” (Emphasis added.)

45-5-208, MCA Negligent Endangerment, as enacted in HB 301, provides 1) “A person who *negligently* engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of negligent endangerment. 2) A person convicted of the offense of negligent endangerment shall be fined an amount not to exceed \$1,000 or imprisoned in the *county* jail for a term not to exceed 1 year, or both.” (Emphasis added.)

The key difference between the felony of criminal endangerment and the misdemeanor of negligent endangerment hinges on two key words, *knowingly* vs. *negligently*.

Since the revised Vehicular Assault section and the new Negligent Endangerment section dealt with misdemeanors, these sections were found to have no fiscal impact to the State. However, with respect to the *Criminal Endangerment Section*, the fiscal note stated it “*entails a wide variety of offenses with an undeterminable fiscal impact*”, and concluded “fiscal impact – unknown.” Keep in mind that felony imprisonment sentences are served in *State prisons*, but misdemeanor imprisonment sentences are served in *county jails*. (Emphasis added.)

HB 301’s sponsor, Representative Rapp-Svrcek testified “this bill plugs a hole in the law by creating the offenses of negligent endangerment and criminal endangerment,” and he pointed out that “these offenses would apply primarily to cases *in which someone would introduce poison into aspirin tablets, or something of that nature.*” (Emphasis added.)

HB301 went to the Senate Judiciary Committee where a brief discussion ensued. Senator Yellowtail asked “if a person drinks a case of beer and gets into a car, is that person guilty of criminal endangerment or negligent endangerment?” Senator Halligan, an attorney, responded that “A prosecuting attorney would charge him with the highest possible charge that they can, which is criminal endangerment. Then it is a felony.”

¹ Montana Legislative History, Chapter 196, 1987. HB 301

His words ring true today. According to the Montana Department of Corrections 2015 Biennial Report², criminal endangerment (categorized as a nonviolent offense) ranked third among the top ten adult conviction offenses for males and females from FY2010—FY2014. In that period of time, 1,684 of the 14,308 (11.8%) convicted adults were convicted of criminal endangerment.

In 1989, another amendment to the criminal endangerment offense was enacted to include the act of tree spiking, carrying on the sponsor's original theme of "non-traditional criminal acts" such as aspirin tampering.

CRIMINAL ENDANGERMENT

A catch-all law for zealous prosecutors

In the Supreme Court decision *State of Montana vs. Bradley Bell*³, Justice Treweiler dissented from the majority opinion that the defendant was guilty of criminal endangerment for a driving offense. In his dissent, Treweiler stated, "I dissent from the majority opinion which transforms anything but the most minor of traffic offenses to a felony punishable by a fine of up to \$50,000 and imprisonment for a period of up to ten years. Surely as a result of this decision, criminal endangerment has become Montana's 'one size fits all' crime of choice for zealous prosecutors." He further opines, "If the Legislature intended the penalty for the exact conduct engaged in by the defendant to be no more than six months and a fine of \$500 (for careless driving under MCA 61-8-302 and 3), how could the Legislature have at the same time authorized a penalty of up to ten years in prison and a fine of up to \$50,000 based solely on the discretion of charging authorities? The majority's conclusion to that effect makes no sense and opens the door to widespread abuse in the application of 45-5-207, MCA."

Justice Karla Gray also dissented, adding "...an additional perspective to that advanced by Justice Treweiler. It is a fundamental precept of the law that statutes defining criminal offenses must 'give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he or she may act in accordance therewith'...various statutory offenses relating to operating a vehicle—including statutes addressing reckless driving, careless driving, and the 'basic speed rule' for urban areas—provide notice to the driver of a vehicle that driving at excessive speeds in a populated area is sanctionable conduct. Section 45-5-207 MCA, the felony criminal endangerment statute, on the other hand, provides no such notice...."

Justice Gray continues, "...The criminal endangerment offense (in HB 301)...was 'designed to plug a hole' in the criminal law. What hole? As the sponsor explained it, the offense would apply primarily to cases in which someone would introduce poison into aspirin tablets or something of that nature. No supporter of the bill testified or suggested that the offense was intended to encompass any conduct

² Montana Department of Corrections 2015 Biennial Report to the People of Montana; Governor Steve Bullock; Director Mike Batista, pages A4, and A12-13. See <http://www.cor.mt.gov/content/Resources/Reports/2015BiennialReport>

³ No. 96-001 in the Supreme Court of the State of Montana, 1996. *State of Montana v. Bradley J. Bell*. Can be found by searching opinions on line at <https://searchcourts.mt.gov/index.html>.

relating to operating a vehicle, much less a speeding offense....Nor, did any of the statutes from other states, upon which HB 301 purportedly was patterned and which were provided to the Judiciary Committees, address any conduct relating to operating a vehicle...The only amendment...(that came during the 1989 session) ...added conduct commonly referred to as 'tree spiking' to the definition of criminal endangerment. Such conduct is of the same nature as the 'aspirin tampering conduct' for which the offense of criminal endangerment was enacted....Nothing in the legislative history of 45-5-207, MCA supports charging Bell's operation of a vehicle at excessive speeds as criminal endangerment. Nor does the language of the statute apprise a person of ordinary intelligence that speeding, with nothing more, constitutes a felony offense. I dissent."

I'd like to emphasize the words Justice Treweiler used in his dissent, "*the criminal endangerment statute is the crime of choice for zealous prosecutors.*" This is *exactly* what Senator Halligan predicted when the law was enacted in 1987. As it stands, criminal endangerment adds nothing to the substantive law other than the leverage to reclassify misdemeanors to felonies, and to compound punishment for lower-class felony offenses.

This brings me to the story I have to tell. They say there are two sides to every story. This is one.

JOE'S STORY

1. FIRST FELONY CONVICTION: CRIMINAL ENDANGERMENT

Enter Joe, an intelligent and personable young man, struggling with mental health issues, self-medicating with alcohol and drugs, and a record of misdemeanors. One day in 2009 – at age 24 – he entered a grocery store, and pocketed a \$5.00 can of chewing tobacco. He saw that a store clerk had spotted his attempted shoplifting, so he returned the can of tobacco, and offered to pay for it. Instead, the store clerk decided to tackle him. Joe ducked out of the way, and raced out of the store. The store clerk and another clerk followed him out of the store, where Joe tried to escape via bicycle. When the clerks grabbed his bicycle, he tried to swing it free, which could have potentially hurt one of the clerks.

Is he charged with a misdemeanor of shoplifting, theft, or even assault? No, the prosecutor, likely sick of Joe's prior misdemeanor offenses, went right for the throat. He used his expansive prosecutorial discretion to charge Joe with "felony robbery" which has a sentence of up to 20 years in prison. The felony robbery was for using "violence" in the commission of a theft, even though the only thing that could have constituted violence in that act was when Joe ducked out of the way to avoid being tackled, causing the store clerk to inadvertently run into a door. The prosecutor offered a plea bargain, and on the advice of his public defender, Joe plea-bargained the burglary to the "lesser" crime, *but still a felony*, of criminal endangerment. He received a deferred sentence, and, after a violation, was sent to the Missoula Assessment and Sanctions Center (MASC), Connections Corrections in Butte,

and then Missoula pre-release, where he completed all programs successfully, and ultimately returned to the community under the supervision of the Department of Corrections (DOC) for the remainder of his sentence.

2. SECOND FELONY CONVICTION: CRIMINAL ENDANGERMENT

Joe was doing fairly well, pursuing an education, keeping close contact with his family and working, until August 2013. He was arrested for a new offense. He apparently was intoxicated, drove to a convenience store to buy beer, was refused service, and drove erratically away. (It appears that he had been drinking, but whether or not he was beyond the legal limit is unknown, as neither Breathalyzer nor blood tests were administered.) On his way to a second convenience store to purchase beer, he stopped in front of the house of another young man, Marc, and exchanged words. Joe remained in his vehicle, while Marc ran out of his driveway with a metal bar and gun in hand, and shot four hollow point bullets from his automatic pistol at Joe. The bullets entered the driver's side of Joe's vehicle, where he was sitting. Four additional unspent bullets were later found on the ground.

Joe panicked, tried to get out of the confined neighborhood with few exits, and seemingly drove away recklessly. Joe, shaken and not thinking straight, drove to a third convenience store, where he was spotted by law enforcement, pursued, and arrested. He received a citation for reckless driving and a few other misdemeanor offenses. When he was taken to the jail for interrogation, he was still enraged at being pepper sprayed after he was already in handcuffs. (I reviewed the videos and heard the audio of the arrest and believe this to be true.) Joe was verbally abusive to the arresting officers, and made very offensive – and later regrettable – statements.

3. A COUNTY PROSECUTOR'S POWERFUL ARSENAL

Rather than pursuing the law enforcement officer's original charge of reckless driving, or even charging Joe with a DUI, the same county prosecutor charged Joe with several offenses, the highest of which was criminal endangerment. Additionally, the prosecutor threatened to pursue 46-18-501&502, MCA Persistent Felony Offender (PFO), for a second felony within a five year period. If an offender is found guilty of a second felony within five years, the PFO once charged, applies. A PFO has a mandatory minimum sentence of *10 years in prison with a maximum term of 100 years*.

The *County Prosecutor* has sole discretion whether or not to charge a defendant with a PFO. It is not automatic. However, once the prosecutor makes the charge of a PFO and the defendant is found guilty of a felony, the sentence is *mandatory*. *Judges have no discretion whatsoever*. *The defendant's attorney has no way to dispute its applicability or harshness*. Mandatory minimums and sentencing guidelines, such as Montana's PFO statute, *remove discretion from judges and alternatives to incarceration, contributing to the rising costs of the correctional system*.

This time, Joe had a private attorney. In addition to paying for the attorney, he was required to pay for transportation and sheriff escort to another city for evaluation by a psychiatrist. \$20,000 later, the prosecutor offered to drop the PFO and the misdemeanor charges, and offered a suspended sentence *if Joe agreed to a plea of criminal endangerment*. Joe's alternatives were to plead guilty to criminal endangerment or risk, if convicted of criminal endangerment, a PFO sentence of 10-100 years in Montana State Prison. In the end and with the understanding he would not go to prison, Joe again decided to plea to criminal endangerment, no PFO, nor additional misdemeanor charges. It was not a good deal, but a great deal less risky than the possibility of a long-term incarceration for a PFO. The Judge ordered a five year suspended sentence, consecutive to his 2009 offense. With all this, Joe's State supervision ends in 2020.

Joe chose the plea bargain because he feared the offensive statements he made after his arrest would prejudice the jury, and the judge denied his motion to exclude the video of his behavior. So, now Joe has two felonies of criminal endangerment because of shoplifting a can of chew, and then reckless driving after another man shot four hollow point bullets at him. This is a primary example of an overzealous prosecutor using a "catch all" provision of Montana law.

4. PROSECUTORIAL DISCRETION AND DISPARITIES IN THE CRIMINAL JUSTICE PROCESS

Ironically, the man, Marc, who shot at Joe in a residential neighborhood, admittedly threw his gun away, and disappeared for three days knowing that police were looking for him. When he was finally arrested, drugs were found in his vehicle. Meanwhile, during his three day hiatus, his brother, who owned the car Marc drove to get away, arranged to have the car crushed. The prosecutor did not pursue charges of attempted murder or assault with a deadly weapon, but offered a plea bargain to the single felony of "tampering with evidence" (for throwing the gun away). The gun was never found and the prosecutor did not require Marc to reveal its location. For all we know, that weapon is still out there, or could have been used to commit other crimes.

This incident demonstrates the unbridled power of a county prosecutor, and the range of "prosecutorial discretion." Joe received a harsh felony sentence, while the perpetrator, Marc, skated by on a lesser felony charge and a suspended sentence. He was not even charged with criminal endangerment. Is there disparity in the criminal justice process? I think there is. In this situation, both men were white and around the same age, but Joe, the potential victim of what could have been a fatal shooting, received the harsher sentence, while Marc just slid under the radar. Why?

LACK OF PROSECUTORIAL ACCOUNTABILITY

Although prosecutors must abide by the Montana Rules of Professional Conduct and Special Responsibilities as a Prosecutor, there is nothing to ensure a level playing field among alleged perpetrators or defendants.

Unfortunately, people who have been convicted of crimes and their families are afraid to pursue charges of malicious prosecution. What's the point? It cannot be done in the moment, or it could make the situation worse. Plus, like Joe and his family, they are embarrassed, and afraid they lack credibility, because they have been categorized as criminals or poor parents. They also fear that the prosecutor may retaliate by exercising even greater "prosecutorial discretion" against the offender or his family, if one of them should be cited for a minor offense in the future. And, with such a wide range of prosecutorial discretion, it would be hard to prove "malicious" anyway, even though it may be disparate or unfair.

The fact is, prosecutors have little accountability to the public, the corrections system, the State, or to defendants and their families. As you well know, the State, not the county in which an individual is prosecuted, pays for felony incarceration or alternative sentencing. *This is one reason why it is more attractive for a county prosecutor to charge a defendant with a felony rather than a misdemeanor.* The State pays for felons to go to Montana State Prison, while the County pays for jail time for individuals convicted of misdemeanors. This creates a huge incentive for counties to pursue felonies, rather than misdemeanors.

A single prosecutor can disproportionately drive up felony crime rates, but doesn't even need to report relevant statistics to the public or Legislature. While one might argue that a county prosecutor will not be re-elected if voters don't think he or she is doing a good job, that is not necessarily true. Unless voters or their family members are directly involved in a criminal case, ordinary citizens have no idea of the time, resources, and complexity involved in defending a case, when the prosecutor has expertise, staff, resources, and laws like criminal endangerment, persistent felony offenses, plea bargains, and excessive bail in his/her favor. While a man might be innocent until proven guilty, the odds are sure stacked against him. Right now, prosecutors are only measured by what the public perceives as maintaining a safe community. There are no other measures in place.

IMPLEMENTING PERFORMANCE STANDARDS TO ENCOURAGE BETTER AND LESS COSTLY PROSECUTORIAL DECISIONS AND TO MEASURE PROGRESS TOWARD SPECIFIC GOALS

In a report prepared by the Brennan Center for Justice, entitled "Federal Prosecution for the 21st Century"⁴, the authors discuss the prosecutor's role in reducing imprisonment, and quote Attorney General Holder's August 2013 statement, "We must never stop being tough on crime. But we must also be smarter on crime. Although incarceration has a role to play in our justice system, widespread incarceration at the federal, state, and local levels is both *ineffective and unsustainable*." (Emphasis added.)

⁴ Federal Prosecution for the 21st Century, Brennan Center for Justice, NYU School of Law, by Lauren Brook Eisen, Nicole Fortier, and Inimae Chettier. See

Further excerpted from the Report⁵, "In July 2014, the Brennan Center convened a Blue Ribbon Panel of several of the nation's leading current and former federal prosecutors to inform the recommendations of this report. U.S. Attorney General Eric Holder participated in a portion of this discussion.

The Panel explored how federal prosecutor priorities have changed in light of the emerging consensus that we cannot prosecute and incarcerate our way to a safer nation, and which goals federal prosecutors should prioritize in the 21st century. There was overwhelming agreement that prosecutors are in a unique position to help effect a shift away from an unnecessarily punitive model that over-relies on incarceration toward an approach that focuses on reducing crime and using effective, well-calibrated responses to crime.

The Brennan Center continues on this point, by stating (emphasis added), *"Outside the sentencing judge, no actor in the criminal justice system wields more influence than the prosecutor over whether an individual spends time in prison. Prosecutors are granted unique authority to make charging decisions, enter cooperation agreements, accept pleas, and frequently dictate sentences or sentencing ranges. Today, more than 90 percent of cases are resolved via the plea bargaining process, making the prosecutor that much more influential."* This has certainly been true for Joe and others I know who are caught in "the system."

Further, "Shifting prosecutorial priorities to include focusing on reducing the numbers of people sent to prisons could have a dramatic impact. Not accepting certain types of drug cases, altering charging decisions, or recommending diversion or alternative sentences for drug offenders would reduce the number of drug offenders entering the Federal Bureau of Prisons and are well within a prosecutor's discretion."

The Brennan Center recommends shifting priorities and imposing success measures for reducing prison and jail populations. Although this particular report focuses on the U.S. Attorney's office, the Brennan recommendations offer practical solutions that can be readily adjusted to state and county attorney offices.

SUCCESS MEASURES	
1. Recommended Success Measures for Reducing Violence and Serious Crime	
Change in violent crime rate	
Percent of violent crime cases on docket, compared to previous year	
Percent of serious crime cases on docket, compared to previous year	
Percent of community reported feeling safe (optional)	
2. Success Measures for Reducing Prison Populations	
Percent of defendants sentenced to incarceration, compared to previous year	
Percent of sentenced defendants for whom prosecutors recommend downward departures from the (federal) sentencing guidelines, compared to previous year;	
Number of federal prisoners that originated from district compared to previous year	
Percent of national federal prison population originating from district.	

⁵ Ibid. pages 9-10.

3. Success Measures for Reducing Recidivism
Percent of prisoners convicted of new crime within three years of release, compared to previous year
Percent of prisoners convicted and sentenced to a new crime within three years of release, compared to previous year
4. Success Measures for Reducing Pretrial Detention
Percent of defendants held in pretrial detention, compared to previous year

This data can easily be collected and compiled by county employees—or even law or social work students. After a few years, commissioners, legislators, and members of the public would be able to see trends, assess results, and make informed decisions.

The Brennan Center report contains many more very specific recommendations, observations, and best practices. It is definitely worth reading.

SUCCESS-ORIENTED FUNDING

The Brennan Center Report also sets forth a policy model called Success-Oriented Funding, which ties government dollars as tightly as possible to clear priorities that drive toward the twin goals of reducing crime and reducing mass incarceration.

The Report gave me some ideas as to how one might implement success-oriented funding in Montana. What if the Commission on Sentencing were to recommend legislation to change the way prison time and alternative sentences are funded? For example, charge the cost of felony incarcerations to the counties, but also give the counties an appropriation for a specific amount based on a formula that takes into consideration county demographics, population, prisoners, and some of the performance measures recommended above. If the county exceeds the appropriated amount, the county has to pay the amount over and above the appropriation, or at least show statistics to justify a request for additional State funding. This would compel counties and prosecutors to develop priorities for prosecution, and seek alternative sentencing for non-violent offenders. On the other hand, if the county's felony convictions fall, or referrals to less expensive alternative sentencing options increase, there may be funds leftover and available to the county for other discretionary purposes.

Most likely, county commissioners and prosecutors will object to this change and the increased level of accountability, and it will be a difficult political battle. But, the bottom line is that *all individuals sentenced to state prison have been charged and prosecuted at the local level*. Montana state taxpayers are paying for the costs of incarceration and correctional programs that are driven by county prosecutors and judges.

I have extensive personal experience working in a government program that is measured in five key performance areas, and receives incentives based on performance. It was phased in over several years. It definitely focuses the staff and program on priorities. It allows apples-to-apples comparisons among states, and tracks an agency's progress over time. It is a way to measure success, and identify challenges. Change is hard, but it can be done.

JOE'S STORY CONTINUED

5. OFF TO MONTANA STATE PRISON (MSP)

And now, to continue Joe's saga... Joe was held in jail in the county where he was charged, and later was moved to a neighboring county, requiring his family and his defense attorney to travel farther to visit and discuss legal matters. After his probation violation (the violation leading to the criminal endangerment charge), Joe and his attorney had been told by his current and former probation officers (the first one retired), that he would be assigned to the Sanction, Treatment, Assessment, Revocation, and Transition (START) program.

From the date of his arrest to the legal disposition of his case, Joe languished in jail for over 10 months before he was to be transferred to START. (Probation violators do not have any bail, and can be retained in jail for as long as their original sentence.) The day of transfer finally came, and he got into the van. He quickly learned that it was headed to MSP, not to START. Later that day, a kind jailer called the family on Joe's behalf and informed them that Joe was headed to prison. The family was devastated. This had never been expected.

Joe was put into Intake in MSP, dubbed "Fish Row", a 23 hour-a-day lockdown, where he would be held for at least 60 days with little opportunity to go outside or do recreational activities. This experience was extremely detrimental to his mental health and his attitude. During the time he was incarcerated on "Fish Row", he and other new inmates were given an orientation, which included a lecture from a DOC official *discouraging the new inmates from filing for parole with the Parole Board until they had been in prison for at least 6-8 months (in addition to any jail time already served.) They were guaranteed they would be "flopped," i.e., it was unlikely parole would be granted.* Joe's hopes were dashed.

Immediately, Joe's family went to bat for him. They wrote a detailed letter to the Department of Corrections, Probation and Parole Bureau (P&P), explaining Joe's circumstances, and the prior DOC agreement that he should not go to prison. Fortunately, P&P listened, and after spending 17 days in MSP, Joe was transferred to START. He remained in START about nine weeks, was transferred to a two-month treatment program (Connections Corrections), and then spent about 200 days in a pre-release center. He is now back in the community. I am pleased to report Joe, now age 32, is doing well today. He has a steady job, strong work ethics, is renting a house, and writing a book. His employer absolutely loves him, and trusts him implicitly. With five more years under DOC supervision, it is one day at a time.

However, Joe remains fearful that with one wrong move— or even a beer can thrown in his yard by someone else, a minor traffic violation, or a false allegation by a citizen or employer— could throw him back into MSP. He has lost his trust in the justice system, and his hope that things will eventually work out.

Joe is only one of the 30% of Americans⁶ with a criminal record, only one of the 90% of defendants who enter into plea bargains, and only one of every 35 adults⁷ who are in jail, prison, or on probation or parole. I am sure other Montanans who fit within these statistics have similar stories. I encourage the Commission to set time aside to hear them.

ADDITIONAL INFORMATION AND RESOURCES

The Urban Institute recently published an article entitled, “Ten Reasons to Care about Your Local D.A. (District Attorney) Race”⁸. I have summarized them below. They are applicable to county prosecutors as well, and I urge you to keep them in mind when looking at sentencing because *prosecutors — and their decisions to prosecute — drive the correctional system*. The article also includes great links to relevant statistics, as well as information regarding reformations of the New York and California criminal justice systems.

I am surprised — and dismayed — that the PEW Report⁹ to the Montana Department of Corrections didn’t even mention prosecutorial power, since it is *the driving force* in the criminal justice system.

Ten Reasons to Care about Your Local District Attorney Race	
1.	Eighty-six percent of the national prison population is under the jurisdiction of the states.
2.	All individuals sentenced to state prison have been charged and prosecuted at the local level.
3.	Local practice can have a profound impact on the state prison population.
4.	Prosecutorial decision making, in particular, is a key driver of state prison population growth.
5.	So-called “tough on crime” policies allow prosecutors to wield tremendous power within the criminal justice system.
6.	Prosecutors—not juries or judges—determine guilt in the vast majority of felony cases.
7.	Perverse financial incentives tilt the scales of justice toward harsher punishments.
8.	Broad criminal laws allow prosecutors to circumvent legislative changes aimed at curbing incarceration rates.
9.	The power to determine who goes to prison, and for how long, is largely unchecked by voters and the other branches of government.
10.	Prosecutors don’t agree on the objectives that define their success.

⁶ Brennan Report Page 14

⁷ U.S. Department of Justice, Bureau of Justice Statistics, Correctional Populations in the United States, 2013. See <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>.

⁸ Urban Institute’s Urban Wire, “Ten Reasons to Care about Your Local DA Race” October 3, 2014 by Brian Elderbroom. See <http://www.urban.org/urban-wire/ten-reasons-care-about-your-local-da-race>.

⁹ Report entitled, “Policy Options for Improving Public Safety, Holding Offenders Accountable and Containing Corrections Costs in Montana – Report to the Governor’s Office and the Department of Corrections; prepared by the National Governor’s Association Center for Best Practices and the PEW Charitable Trusts. See

CHANGING MONTANA'S PRISON-FOCUSED JUSTICE SYSTEM

According to statistics gathered by PrisonPolicy.org, "The U.S. incarcerates 716 people for every 100,000 residents, more than any other country. In fact, our rate of incarceration is more than five times higher than most of the countries in the world. Although our level of crime is comparable to those of other stable, internally secure, industrialized nations, the United States has an incarceration rate far higher than any other country."

While Montana's incarceration rate is slightly below the U.S. average, like the U.S., as a whole, Montana still incarcerates more people per capita than all other countries.¹⁰

What can we do about this? In light of Joe's story and my research, I have a number of recommendations for the Commission's consideration:

- 1) Instead of focusing on the "back end" of the system (correctional facilities) or just focusing on offenders who are in or entering the system, look at how they get there. *Look at the offenses for which people were prosecuted in the first place, and the disparities in prosecution and sentencing, not just by race, gender, or age, but also by crimes of similar nature.*
- 2) Repeal 45-5-207, MCA – Criminal Endangerment – it is indeed a "one size fits all" crime of choice for zealous prosecutors. *Virtually every crime to which criminal endangerment might apply is covered in another statute: there is absolutely no need for this statute.*
- 3) Revise or repeal laws with mandatory sentencing or minimum sentences, such as Montana's Persistent Felony Offender 46-18-501&502. MCA. *Judges have no discretion or opportunities for leniency or mitigating circumstances.*
- 4) Enact laws mandating reporting of key statistics such as those outlined in the Brennan Report, as well as statistics related to plea bargains and crimes charged. *This is the only way to make informed data driven decisions now and in the future.*
- 5) Encourage and incentivize (or provide disincentives such as elimination of funding) prosecutors and counties to change their priorities to focus on truly violent crimes, and look at sentencing alternatives. *Until counties have a stake in funding felony incarcerations, there is no incentive to change the current process.*
- 6) Encourage the public to evaluate and elect prosecutors based on criteria other than how many people are prosecuted and incarcerated each year. *Right now, the public does not have any objective criteria to measure effectiveness of criminal justice system, and must rely on anecdotal information and press reports on charges filed, the apparent guilt or innocence of a defendant, and just plain old campaign rhetoric.*
- 7) Increase funding of the Montana public defender system, and incentivize those defense attorneys who remain long-term. Measure turnover and experience, if not measured already. Indigent defendants need counsel with the experience and expertise to represent

¹⁰ States of Incarceration: The Global Context, Prison Policy. See <http://www.prisonpolicy.org/global/>.

them against better paid and more experienced prosecutors, who have vastly greater resources at their disposal.

The above are reasonable, and well supported. They will help Montana move forward.

CONCLUSION

As an ever law abiding citizen myself, I always felt that if someone was convicted, he or she must have committed the crime. Now I know that it is far from true. The system is driven by prosecutors, who are accountable to very few, know how to wield laws to their advantage, rely on plea bargains and mandatory minimum sentencing laws, and rack up convictions as "proof" of a working justice system.

Right now, prosecutors are measured by how many wins they can get against Montana defendants who generally cannot afford private counsel, and are represented by over-burdened and often inexperienced public defenders. Minimum sentences, three strike laws, etc., just exacerbate the unfairness and leave judges without any discretion.

Defendants don't really have a good alternative to a plea bargain especially when faced with mandatory sentencing. Going to trial—even with an experienced criminal defense attorney—is just too risky.

I know firsthand. ¹Joe is my son.

Respectfully,



Mary Ann Wellbank

C: Representative Matthew Monforton
Senator Kristin Hansen
Senator Cynthia Wolken
Honorable Ingrid Gustafson
Mr. Mike Batista, Director
Mr. Peter Ohman
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